United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7601

To be argued by:
David S. Heller, Esq.

United States Court of Appeals

For the Second Circuit

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Plaintiffs-Appellants,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN, AND HUGH CAREY,

Defendants-Appellees,

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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STATEMENT

This is an appeal from a judgement entered in the office of the clerk of the United States District Court for the Eastern District of New York (Mishler, U.S.D.J.) dismissing the complaint.

The dismissal followed an evidentiary hearing conducted

before the Honorable Jacob Mishler, Chief Judge, U.S. District Court, Eastern District of New York.

The plaintiffs are voters, legally registered to vote in the Federal Election in the State of New York, plaintiff Lyndon LaRouche was a candidate of the Labor Party for the office of President of the United States, whose name appeared on the ballot in the State of New York, and the Rockland County Conservative Party is a duly constituted political organization active in the Federal Election, which did not support the Labor Party or its candidate.

The complaint (3a) was docketed in the District Court on November 22, 1976, seeking declaratory and injunctive relief pursuant to 42 USC 1983, 1985 (3), 1988, and 28 USC 1331 and 1343. In addition to declaratory and injunctive relief the complaint sought monetary damages.

A review of the procedural posture of this case in the district court requires delineation to bring this appeal into proper focus.

In essence, plaintiffs petitioned the District Court to enjoin the Secretary of the State of New York and the Governor of the State of New York from certifying 41 electoral votes to the Electoral College in Washington, D.C. The timing was and is of vital consequence. Pursuant to Federal statutes involving elections, States were required to certify their electoral votes on or prior to December 13, 1976. In order to meet that deadline, plaintiffs simultaneously filed an Order to Show Cause (24a) requesting a temporary restraining Order *pendente lite*. This had the effect of bringing on for immediate argument the procedural and substantive issues involved in this important litigation.

The plaintiffs, in support of their application for a temporary restraining Order, submitted to the Court approximately 50 affidavits of various individuals, delineating specific acts of election fraud which plaintiffs contended demonstrated a *prima facie* showing of a tainted election. These affidavits were submitted to the Court in the nature of an offer of proof

to demonstrate to the District Court the bonafides of the action in chief as well as the application for a restraining Order.

On December 1, 1976, Judge Mishler heard oral argument on behalf of the parties. The State Board of Elections was represented by special counsel, the New York City Board of Elections was represented by the Corporation Counsel of the City of New York, and the Secretary of State and the Governor of New York State were represented by the Attorney General of the State of New York. Judge Mishler, *sua sponte* directed all counsel to appear before him again on December 2, 1976 at which time he heard additional argument.

The defendants, in the interim, served and filed Motions to dismiss the complaint (15a et. seq.). At the second argument Judge Mishler had before him the Complaint, Petition for a Temporary Restraining Order and the Motions to dismiss the complaint. The Court advised all counsel that he was fully cognizant of the serious underlying substantive questions presented, as well as the procedural problems. He recognized the multiplicity of procedural problems which could be raised such as Standing, Proper Parties, etc. Judge Mishler further stated that justice would best be served by his holding in abeyance these procedural problems, and having the Court address the merits of the claim itself susceptible of appellate review. Accordingly, in a preliminary decision dated December 7, 1976 (60a) he directed that an evidentiary hearing commence on December 8, 1976. In that memorandum decision and Order he set forth the standards and criteria to be applied in the evidentiary hearing.

In essence, this appeal seeks to overturn the legal criteria formulated by the Court below. For good and practical reasons, these appellants do not seek by this appeal to decertify the election of James Earl Carter as President of the United States of America. The proof elicited at the evidentiary hearing demonstrated a pattern of voting fraud which had the direct and immediate effect of unconstitutionally

diluting votes properly and legally cast. In the words of Mr. Justice Powell in *Anderson v U.S.*, 417 U.S. 211, 227 (1974):

> "Every voter...whether he votes for a candidate with little chance of winning, or for one, with little chance of losing, has a right under the Constitution to have his vote fairly counted without its being distorted by fraudulently cast votes."

THE LEGAL ISSUES PRESENTED BY THIS APPEAL

The criteria evolved by Chief Judge Mishler are criteria of first impression, and being of singular and national importance, require Appellate review to assure constitutional protection in future elections.

The issues herein are not moot (Point I infra). Accordingly, this Appeal will be limited to two very specific areas of law: (I) mootness, (II) the clearly erroneous requirement of proving criminal intent in the Civil action.

THE LAW

POINT I

THE ISSUES HEREIN ARE NOT MOOT

It is clear that under the principles set forth by the United States Supreme Court, the case at bar is not moot. As is plainly indicated by the record of the case as fully developed below, the action presents both a substantial claim for damages and a viable and continuing issue of primary constitutional magnitude, which by its very nature is likely to reoccur, but evade review. Furthermore, because plaintiffs bring the action in their representative capacity, the issues pose a continuing controversy between the represented class and the defendants.

THE CONTROVERSY IS ONE THAT IS CAPABLE OF REPETITION, YET EVADING REVIEW, AND IS THEREFORE NOT MOOT.

Plaintiffs' claim (the dilution of their constitutional right to the franchise) stems from the Presidential elections of November 1976. In connection therewith, plaintiffs have charged defendants with unlawful and fraudulant conduct, and sought damages and a ruling that the election was conducted in violation of the Constitution. Neither plaintiffs, nor the class which plaintiffs represent, could vindicate their rights in a high court if the mootness doctrine were to be applied. Because of the time element inherent in the electoral processes, application of the mootness doctrine would systematically abort judicial review of the gravest violations of the most fundamental of rights — the right to vote. The Supreme Court does not permit such a result and has therefore propounded the principle that a case is not moot if the problem is "capable of repetition yet evading review." (See, *Southern Pacific Terminal v ICC*, 219 U.S. 498, (1911) (ICC rate making); *U.S. v W.T. Grant*, 345 U.S. 629 (1953) (interlocking directorate); *Carroll v President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (right to congregate); *Roe v Wade*, 410 U.S. 113 (1973) (abortion); *Doe v Bolton*, 410 U.S. 179 (1973) (abortion); *SuperTire Engineering Co. v McCorkle*, 416 U.S. 115 (1973) (strike); *Frost v Weinberger*, 515 F. 2d 57 (2nd Cir. 1975), cert den. — U.S. —, (social security benefits); *Andujar v Weinberger*, 69 F.R.D. 690 (1976) (social security benefits); *Moore v Ogilvie*, 394 U.S. 814 (1969) (election).

It is important to note that the case to first coin this oft-cited principle, *Southern Pacific Terminal v ICC*, *supra*, carved this exception to the mootness doctrine in part because the controversy therein concerned interests of a public character. Plaintiffs there had challenged the legality of an ICC order prohibiting the granting of a rate preference. By the time the case reached the Supreme Court for review, the ICC order had terminated.

Similarly, in *U.S. v Grant, supra,* the Court held as not moot a suit to enjoin an interlocking directorate which had terminated by the resignation of the defendant from certain corporate boards, before the appeal. The basis of the Court's decision was that the defendant was free to resume his conduct "(and there was) a public interest in having the legality of the practices settled." Id. at 62.

The electoral processes are more in the public weal than the existence of an interlocking directorate and are exemplary of the *Southern Pacific Terminal* rule. Therefore the Court has time and again refused to declare election cases moot. To deprive a plaintiff of a remedy because an election is over would be to invite an infinite and irremediable cycle of future abuses and invocations of the mootness doctrine. (See, *Moore v Ogilvie,* 394 U.S. 814, 816 (1969); *Dunn v Blumstein,* 405 U.S. 330, 332 n. 2 (1972); *Rosario v Rockefeller,* 410 U.S. 752, 756 n. 5 (1974); *American Party v White,* 415 U.S. 767, 770 n. 1 (1974); *Salera and the U.S. Labor Party v Tucker,* 399 F. Supp. 1258, aff'd — U.S. —, 96 S. Ct. 1451 (1976), *Fishman v Schaffer,* 50 L. Ed. 2d 56 (1976). A typical expression of the doctrine as applied to election cases may be found in *Storer v Brown,* 415 U.S. 724, 737 n. 8 (1974):

> "The election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issue properly presented and their effects...will persist...(T)his is therefore a case where the controversy is 'capable of repetition yet evading review.'"

The case at bar, evolving from, and directly related to, the electoral processes, is therefore clearly situated within the parameters of the *Southern Pacific Terminal* rule.

The above cited cases concern challenges to allegedly unconstitutional statutes, or orders; the case at bar is a challenge to a court evolved standard, which under the doctrine of *stare decisis* is in *pari causa*. If this rule of law is permitted to stand, it constitutes an open invitation to the repetition of such activities as alleged herein; or in more mundane terms will constitute a "license to steal elections."

The burden is on the *defendants* to show that it is "absolutely clear that the allegedly wrongful behavior could not

reasonably be expected to reoccur." *U.S. v Concentrated Phosphate Export Association* 393 U.S. 199, 203 (1968); *U.S. v W.T. Grant, supra*, at 633. (See also, *Securities and Exchange Commission v Medical Committee for Human Rights*, 404 U.S. 403 (1971); *Grey v Sanders*, 372 U.S. 368 (1963); *Frost v Weinberger, supra*; *Andujar v Weinberger, supra*. The latter two cases involve allegedly faulty methods of paying out social security benefits, which methods are not compelled by law.

Moreover, under the above cited cases, the law is clear that the voluntary discontinuance of the challenged conduct does not moot the case, unless defendants demonstrate that "there is no reasonable expectation that the wrong will be repeated." *U.S. v W.T. Grant, supra*, at 633, quoting *U.S. v Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945). *It is the "mere possibility (of recurrent violations that) serves to keep the case alive."* Id.

There is every reason to expect that the American electorate will be subjected to the same dilution of their right to vote in succeeding elections (federal, state, or local) unless an *enforceable* remedy is provided.

THIS ACTION PRESENTS A CLASS WITH A CONCRETE CONTROVERSY

In the case at bar, it cannot be overstressed that the claims as they relate to the named plaintiffs are viable and in all likelihood these same individuals, at the next election, will be forced to again seek judicial relief if none be forthcoming herein. Already, plaintiff Lyndon H. LaRouche has declared his presidential candidacy for the U.S. Labor Party in the next national elections.

However, assuming *arguendo* that the interests of the other individual plaintiffs be deemed extinguished at this time, the *Southern Pacific Terminal* rule operates to save the case from mootness. As a class action election suit, this case

presents the classic features for the operation of the rule. Where the interests of the named plaintiff are extinguished, but the class he represents are not, the court permits the named plaintiff to continue his representation in order to insure that the repeated conduct of the defendant does not evade review. *Sosna v Iowa*, 419 U.S. 393 (1975); *Gerstein v Pugh*, 420 U.S. 103, 110 n. 11; *Richardson v Ramerez*, 418 U.S. 24 (1974); *Goosby v Osser*, 409 U.S. 512; *Brockington v Rhodes*, 396 U.S. 41; *Roe v Wade, supra*. Thus the existence of a class action removes the necessity that there be a "reasonable expectation that the same complaining party...be subject to the same action again." *Weinstein v Bradford*, 423 U.S. 147 (1975) *1*

The fact that this case was dismissed before any application could be made for certification for class action status does not detract from the applicability of the *Southern Pacific Terminal* rule. The case was pleaded as a class action (32a) and the pleadings are at least a *prima facie* indication that it was properly so pleaded, in the absence of a ruling to the contrary.

The Second Circuit has applied the *Sosna* class action rule, whereby the class assumes a legal status separate from the interest of the named plaintiffs in order to avoid class action claims from being mooted, even where the classes have not yet been certified. *Andujar v Weinberger, supra*; *Frost v Weinberger, supra*. In fact, the Supreme Court in *Gerstein v Pugh, supra*, stated that the certification of the class is not required where circumstances, including those of time, do not permit.

The lack of necessity for certification is especially true in election cases where the court has noted the importance of

1 In any event, the plaintiffs at bar represent the full spectrum of interested or entitled parties, i.e.: Donohue, Weissman, Bramwell, Stewart sued as private citizens; Vanasco, Long and LaRouche as candidates on the ballot; Rockland County Conservative Party as a partisan political club; the Labor Party as an official political party sponsoring a candidate for president (LaRouche) and entitled to election funds under the Federal Election Campaign Act. Even if the interests of one or more of the individuals is deemed to be moot, there are remaining plaintiffs individually, and as a class, who are likely to be subject again to the same action.

the issues to all the voters and candidates and has reviewed the constitutional claims even after the election has taken place, and without reference to the absence of a certified class action. *American Party v White, supra; Storer v Brown, supra*; *Moore v Ogilvie, supra*; *Dunn v Blumstein, supra*.

Thus, the fact that the instant action was commenced as a class action, even though not so certified, renders it incapable of becoming moot, even were it not the case, *arguendo*, that the named plaintiffs would be injured similarly in the future.

In reality the class alluded to in *Anderson v U.S., supra*, consists of one hundred million voters. The rule of law enunciated by the trial court, which is the subject of this appeal, is a rule of law affecting the hundred million voters in this country. Therefore, given the expectation of recurring and allegedly unconstitutional conduct, it must be said that, as to the class, there exists a concrete controversy capable of repetition yet evading review.

Plaintiffs emphasize, however, that they, as well as the entire American electorate, will be injured in the future, as in the past, unless their rights are upheld by this Court, since their rights are subsumed within the rights of "every voter" referred to by Mr. Justice Powell in *Anderson, supra*.

THE EXISTENCE OF A BONA FIDE CLAIM FOR DAMAGES IS A LIVE ISSUE AND PREVENTS THE CASE FROM BEING MOOT

The Court below has implied that plaintiffs have stated a non-frivolous claim for monetary damages under 28 U.S.C. 1331 (a). See Opinion of December 7, 1976 (73a). The law of this Circuit and as set forth by the Supreme Court is that even when an action for declaratory and injunctive relief has become moot, a claim for monetary relief continues to be viable. *Bond v Floyd*, 385 U.S. 116, 128 n. 4 (1966); *Powell v*

McCormick, 395 U.S. 486 (1969); *McCabe v Nassau County*, 453 F. 2d 698 (2d Cir. 1971); *Winters v Miller*, 306 F. Supp. 1158 (1969); *Ashby v Weinberger*, 402 F. Supp. 1203 (1975).

In *McCabe v Nassau County, supra*, this court held that where monetary damages are timely included in the initial Complaint, and the equitable prayer for relief becomes moot, the claim for damages survives in the Federal Court. In *Powell v McCormick, supra*, petitioner Powell was duly elected to serve in the 90th Congress, House of Representatives. However, he was denied his seat by a resolution of the House. Powell sued for injunctive and declaratory relief and mandamus, charging violations of the Constitution. He additionally sued for the salary denied to him. By the time the case reached the Appellate stage, the 90th Congress had ended. Nevertheless, the Court said that the case was not moot because the claim for back pay remained a viable issue. Furthermore, the Court said, at p. 498-99:

> "Petitioner was denied salary due to an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties. Declaratory relief has been requested....A Court may grant declaratory relief even though it chooses not to issue an injunction or mandamus."

Certainly the alleged fraudulent conduct of the presidential election is an issue of great constitutional and public import, and presents a viable claim under any circumstance, in addition to the direct damages sustained by the plaintiffs at bar.

POINT II

IN A PROCEEDING BROUGHT UNDER THE CIVIL PORTIONS OF THE CIVIL RIGHTS ACT OF 1871 (42 U.S.C. 1983 AND 1985): IT IS A CLEAR ERROR TO APPLY CRIMINAL LAW STANDARDS. IN THIS REGARD THE TRIAL COURT COMMITTED CLEAR ERROR.

The trial Court focused on this issue in the following language:

> "A party contesting a Presidential election carries a heavy burden. Not to put too fine a point on it, this standard implies conduct of a most egregious nature, *approximating criminal activity*." (Italics added) (69a)

The trial Court reached the foregoing conclusion from two erroneous premises.

1 Unless one is attacking a statute per se, in contradistinction to improper application of a statute, it becomes necessary to demonstrate improper intent by those bodies or individuals whose legal obligation it is to enforce the statute.
2 Mere proof of incompetence or negligence by a body or individual applying the statute is insufficient to sustain the burden of one seeking to enforce his constitutional right in an election case, rather, the plaintiffs must demonstrate *mens rea*.

The Court below in its December 7th opinion set forth the following standards of proof:

> "Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents *intentional* or *purposeful* discrimination. (Citations omitted)." (67a) (Italics added).

* * *

"Purposeful deprivation of the right to vote will not be assumed merely because there is evidence that election officials acted incompetently or negligently and, as a result, persons not properly registered were permitted to vote. Rather *intentional* acts must be proven..." (67a) (Italics added)

The trial Court held that the standard of proof imposed on the plaintiffs was a showing of:

"Conduct of a most egregous nature, approximating *criminal activity*" (69a) (Italics added)

Notwithstanding the fact that the Court below announced the foregoing standard only in terms of plaintiffs' request for a new election, it also applied that standard equally to plaintiffs injunctive, declaratory and monetary prayers for relief. Upon the Court's finding that the plaintiffs failed to meet this standard of proof, the complaint was dismissed (84a).

It is submitted that in requiring proof of *intentional*, indeed *quasi-criminal* acts, the trial court committed clear error. The standards evolved by the trial court create an onerous burden of proof which is not proper in a *civil* action brought pursuant to 42 U.S.C. 1983 and 1985 (3), which action seeks to protect a voter's first amendment rights to an undiluted vote in an election.

THE IMPOSITION OF A QUASI-CRIMINAL STANDARD OF PROOF IN A CIVIL RIGHTS ACTION, UNDER THE CIVIL ASPECTS OF THE CIVIL RIGHTS LAW, IN CONTRADISTINCTION TO THE CRIMINAL ASPECTS THEREOF, INVOLVING VOTER RIGHTS, PRESENTS A NEW, UNIQUE AND ONEROUS REQUIREMENT.

The Court below in the December 7 opinion apparently misapplied the distinction between the civil and criminal

sections of the Civil Rights Act of 1871. The Supreme Court of the United States has emphasized that this is not to be done. In *Monroe v Pape* 365 U.S. 167, 187 (1961) the Supreme Court drew the following distinction:

> "In the *Screws* case, we dealt with a statute that imposed criminal penalties for acts 'wilfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right'. 325 U.S. at 103. We do not think that gloss should be placed on Section 1979 which we have here. The word 'wilfully' does not appear in Section 1979. Moreover, Section 1979 provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against a background of tort liability that makes a man responsible for the natural consequences of his actions." *2*

Monroe v Pape, supra, renders inapposite Judge Mishler's reliance on *Swain v State of Alabama*, 380 U.S. 202; *Oyler v Boles*, 368 U.S. 448; *United States v Price*, 383 U.S. 787; *United States v Guest*, 383 U.S. 745; *Powell v Power*, 436 Fed 2d 84; and *Snowden v Hughes*, 321 U.S. 1 (67a).

Swain v Alabama, supra, was a criminal case involving alleged exclusion of black jurors. Not only was the intent standard stated in a criminal context, it was mere dicta, since the Supreme Court held that there was neither exclusion nor token inclusion of black jurors. c.f. 380 U.S. at 206 and 227.

Oyler v Boles, supra, likewise arose in a criminal context, and involved alleged selective application of an habitual offender law. Claims of selective prosecution fall into an area of quasi-judicial immunity and are totally unlike claims of deprivation of voting rights. See *Imbler v Pachtman*, — U.S. —; 96 S. Ct. 984 (1976). Furthermore, the intent language in *Oyler* was dicta, since the Supreme Court found that there

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2 The Sect. 1979 referred to in *Monroe v Pape* is 42 USC 1983 (under which this case was brought). 1979 is the numbering of the Revised Statutes.

was a waiver of rights by the represented criminal defendant in that case, 368 U.S. at 453.

United States v Guest, supra, and *United States v Price, supra*, were criminal prosecutions arising out of the murder of civil rights workers in the South, and were precisely the type of cases, such as *Screws*, which the Supreme Court distinguished from civil actions (c.f. *Monroe v Pape, supra*).

Powell v Power, supra, relied upon *Snowden v Hughes, supra*. It is submitted that although the *Snowden* case was not mentioned in *Monroe v Pape, Monroe* had the effect of limiting the *Snowden* intent requirement to equal protection claims. See *Whirl v Kern* 407 F 2d 781, cert. den 396 U.S. 901 (1962); *Cohen v Norris*, 300 F 2d 24 (9 Cir. 1962); *Jenkins v Averett*, 424 F 2d 1228 (4 Cir 1970); *Batista v Weir*, 340 F 2d 74 (3Cir 1965); *Roberts v Williams*, 456 F 2d 819, cert. den. 404 U.S. 866 (1971); *Selico v Jackson*, 201 Fed. Supp. 475, 477 (196 2); *Roberts v Trapnell*, 213 F. Supp. 49, 50-51 (1962); *Johnson* v Crumlish, 224 F. Supp. 22, 25; and see Antieau *Federal Civil Rights Acts*, Sect. 83, notes 6 and 7. However, even if this were not the case, the intent requirement of *Snowden* was never applied to cases involving electoral rights, even in the early days of hostility towards the Civil Rights Act:

> "In the voting rights area, however, purposive intent has *never* been required. Historically, the civil action for damages based upon the deprivation of voting rights was one of the first type of cases to utilize the remedy afforded by Section 1983." The Evolution of the State of Mind Requirement of Section 1983; 47 *Tulane Law Review*, 870, 872 (1973) (Italics added).

That the foregoing analysis of the *Tulane Law Review* article is, indeed, correct is shown by the Federal cases which specifically hold that intent is not a required element of proof in electoral rights cases which span the entire 20th Century.

> "In cases of this character...it (is) not necessary that the plaintiff should allege that the defendant, in rejecting

his vote, acted either maliciously or intentionally wrongful. The statute under which the plaintiff proceeded does not so require." *Brickhouse v Brooks*, 165 F. 534, 543 (1908). See also *Andersen v Meyers*, 182 F. 223, aff'd 238 U.S. 368 (1915).

The more recent cases have granted relief even where a positive finding has been made that criminal intent was absent, e.g., *Urey v Santee*, 303 F. Supp. 119, 123 (Finding of Fact number 14, at page 126) (Conclusion of Law number 5) (1969); *U.S. v Post*, 297 F. Supp. 46, 49 and 50 (Findings of fact numbers 21 and 31) (1969).

The New York State Court of Appeals in *Ippolito v Powers*, 22 NY 2d 594 held that relief could be granted "without evidence of fraud or other intentional conduct" in an election case. The Federal Courts have since adopted this rule, *Lehner v O'Rourke*, 339 F. Supp. 309, 314 (SDNY 1971). It is quite apparent that the trial court at bar predicated its holding on inapplicable cases, all the while ignoring the better and more persuasive cases in the relevant area of electoral rights.

In support of the proposition that plaintiffs may not demonstrate "purposeful deprivation of the right to vote" by a demonstration that election officials acted "incompetently or negligently", Judge Mishler relied on three cases which, it is respectfully urged, are inapposite. *Swain v State of Alabama, supra*; *Smith v State of Texas*, 311 U.S. 128, and *Washington v Davis*, 96 S. Ct. 2040 (67a).

Swain v Alabama, supra, as is demonstrated *supra*, was a criminal case totally inapposite to actions brought under the civil side of the Civil Rights Act.

Smith v Texas, supra, upon which *Swain* is bottomed, arose out of a criminal prosecution wherein there was alleged racial discrimination in jury composition. Remarkably, the only reference to intent in *Smith* is to the effect that intent is not a requirement of proof, 311 U.S. at 132. Thus, the Court below doubly erred in relying upon *Smith v Texas*.

The Court below cited *Washington v Davis, supra*, (67a), without discussion. Because of its recentness, and its notoriety, this case deserves fuller discussion. Several popular accounts would have it that *Washington v Davis* represents a re-introduction of an intent standard into the civil rights act. This is simply not so and certainly not correct in terms of the quasi-criminal intent mandated by Judge Mishler.

Washington concerned tests given to applicants for employment as police officers. The Court held that these tests were not arbitrary, but "reasonably and directly related to the requirements of the police" 348 F. Supp. 15 at 17 (1972). (This citation is the District Court citation.) A greater percentage of black applicants failed the tests than did white applicants. Since, at the time, Title VII of the Civil Rights Act of 1964 did not apply to civil service positions, the plaintiffs sought to have the court apply Title VII requirements (that employment tests be not only "job related" but also "validated". *Griggs v Duke Power*, 401 U.S. 424 (1971), under 42 U.S.C. 1981. This the Court declined to do. The holding of *Washington* does not apply to the case at bar for several reasons. Initially, *Washington* is itself in the nature of dicta, since Title VII as amended in 1972 now covers police force applicants. See 42 U.S.C. 2000e (a). As Mr. Justice Stevens, who joined in the main opinion and also wrote a concurring opinion, noted, the holding was limited to Section 1981. 48 Law Ed. 2d at 616. The case at bar is a Section 1983 case:

> "It is unrealistic...to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker." 48 Law Edition 2d 615. See also *Armstrong v Brennan*, 539 F. 2d 625, 633-4 (7th Circuit, 1976).

Finally, *Washington* was an equal protection case, and so arguably subject to the doctrine of *Snowden v Hughes, supra*. The case at bar is a voting rights case, and is thus totally outside of the doctrine of those cases which require intent, e.g., *Snowden v Hughes*.

The United States Supreme Court has recently demonstrated that it recognized this distinction, and the primacy of electoral rights. As Mr. Justice Powell wrote in *Anderson v U.S., supra*, a criminal case with facts quite similar to those at bar:

> "Every voter...whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right, under the constitution, to have his vote fairly counted without it being distorted by fraudulently cast votes." 417 U.S. at 227.

In its most recent pronouncement concerning 42 U.S.C. 1983, the statute under which the case at bar is bottomed, as opposed to Section 1981, which was before the Court in *Washington v Davis, supra*, the Court specifically negated any quasi-criminal intent requirement such as that imposed by Judge Mishler in this case:

> "An act violating...constitutional rights can no more be justified by ignorance or disregard of settled, indisputable law...than by the presence of actual malice...(defendant is) not immune if he knows, or reasonably should have known, that the action he took...would violate the constitutional rights..." *Wood v Strickland*, 420 U.S. 308, 321-322 (1975).

It surely passes belif that *Wood* would be overruled *sub-silentio* by *Washington*, within one year, in a case involving an entirely separate statute. This is especially so in light of the fact that Mr. Justice White wrote both opinions for the Court. Yet, the Court below at bar, in relying upon *Washington* and not discussing *Wood*, apparently so believed. This belief, it is contended, is clear error.

Pragmatically, Judge Mishler has created a standard which is not only legally not required, but is additionally *impossible of fulfillment*. Given the anatomy of an election fraud, and more particularly the fraud demonstrated in the

case at bar, one notes that it is not the election official who walks into the election booth and casts improper or fraudulent ballots. In the case at bar, some 24 photographs were introduced into evidence (exhibits 9 through 25 and 28 through 38). These photographs were of abandoned buildings in the South Bronx and Buffalo and empty lots in the South Bronx. These buildings were correlated with computer printouts from the Board of Elections (exhibit 27 in evidence). Essentially, the factual demonstration on the trial was that persons unknown registered with the Board of Elections, giving as their legal addresses premises which turned out to be the empty lots and abandoned buildings shown on the photographs. These same persons were later recorded as having voted. Clearly, plaintiff at bar presented no proof that any election official prepared false registration cards, or voted improperly by giving as their address these abandoned buildings or empty lots.

Betty Dolen, the executive director of the New York City Board of Elections, and a co-defendant in this action, testified (32a):

> "Q. How many mail registrations did the New York City Board of Elections receive up to and including November 2, 1976?
>
> A. Up to and including October 4th and postmarked October 4th, I am proud to say, New York City brought in 468, 586 mail registrations."

The election law of the State of New York, Section 153 (9), provides that the County Board of Elections, when it is not satisfied from an examination of an application for registration, or after its initial inquiry, that the applicant is entitled to such registration, may order an investigation, through any officer or employee of the State or County Board of Elections, police officer, sheriff or deputy sheriff" (which Section the Court was asked to take judicial notice of (35a). Mrs. Dolen testified(33a):

"A. After they were clocked in at the general office of the Board of Elections, they were then sent into boroughs. They were also put into alphabetical order by boroughs. Then sent to the— We made an IBM print-out for our own office use by county, by week of the application that came in through the mail."

* * *

Q. How long after a particular application was processed was it that it got onto a computer?

A. The same day. They were closed, divided by borough and alphabetized. (33a)

Q. Do you have 468, 586 names on computers?

A. We have, I would say, about 375,000 names on computers." (33a)

* * *

Q. *Mrs. Dolan, what if anything was built into your system to determine whether a person registered more than once?*

A. When the card — the buff card was put in a binder, if we saw another card with the same name, same birth date, same address, we didn't put the new one in. We just put that aside.

Q. Who put them in the binders at Varick Street?

A. Each borough.

Q. When you say we, you are referring to the --

A. The entire borough, the entire City of New York.

The Court: When you ask what is built into the system, I must note the observation of the Court. That sets out the pattern of the election process designed at least to safeguard against fraud and irregularity. I said before I consider an election an adversary proceeding. The statute provides in the State Constitution right through the legislative enactment and to the election law, that the two parties that received the highest votes in the last election — *it usually means the Democrats and the Republicans* — have equal representation on the State Board of Elections, on the City Board of Election, down to the inspectors of the election. Now, it may be that the inspectors haven't been doing their job. At least the system is designed to safeguard against fraud and irregularities. Mind you, the election law is so specific to say that the election inspectors are supposed to compare the signatures, placing a hand over the signature on the above card first, and announce in public that so and so in voting." (34, 35a).

It was at that point that trial counsel for plaintiffs, Mr. Fetell, requested the Court to take judicial notice of Section 153 of the election law which puts the burden not on poll watchers, but on the board of elections and makes available to it all of the investigative agencies of this State. As counsel pointed out to the Court (35a) "Apparently, the legislature in their wisdom made the County Board of Election the policeman over it and that is why I'm examining Ms. Dolan now." Further pertinent testimony is to be found at 36a:

"Q. Ms. Dolan once these registrations were put into the computer did anybody in the Board of Elections get a read-out to check the double registrations?

A. I got a copy of the — this is not the checking of the registration.

Q. The question is, in its entirety, did anybody get a read-out for the — alphabetical read-out — to check for double registrations at that level?

A. No, not to check for double registrations.

Q. Was there anything — when this system was implemented by the Board of Elections, Was anything done to spot check for the possibility of registering from tombstones to empty lots to empty buildings?

A. No, there is an affidavit on the application and when it is signed — that affidavit must be signed by the applicant. And when that application comes in with the signature on the affidavit, it is presumed what the person filled out it is the truth and also there is a class E felony on the other side which charges in the event it is proven you are not telling the truth, you are subject to a class E felony."

Further along these lines, Mrs. Dolan testified (52a):

The Witness: Well perhaps I am mistaken, but I don't think people go in and vote twice.

Q. You would believe that was a crime wouldn't you?

A. That would be a crime, I would say I don't condone it.

Q. In your capacity with the Board of Elections of the City of New York, do you persume that there is no fraud among voters?

A. Well, I wish we had a utopia of that kind.

Q. Do you recognize that it is a part of your responsibility and the responsibility of the Board of Elections to look for irregularities and report them to the proper authorities, if found?

A. No, we don't look for irregularities, if they are called to our attention we check them out." (Italics added).

* * *

As a matter of law, what difference does it make whether an election official commits fraud directly, or through negligence or condonation permits fraud to be committed by private or partisan groups? *If an election is tainted it is tainted regardless how the taint comes about.*

Mrs. Dolan tesified that she was part of a major program of registration (28a) that there were over 400,000 registrations by mail and that some 50,000 persons voted by "A ballot" (30a), i.e., affidavits in lieu of a registration card, and that of these 50,000 persons 40,000 of them were rejected, all of which demonstrated the mass confusion and inefficiency which pervaded this presidential election. Employees of the board of election came from the "County organization", i.e., the Democratic County organization (31a) and that having been sent down by the party organization these clerks were prima facie qualified. On the last day for registration the Board of Elections received "100,000 applications" (34a) which were sent out to borough offices without a list being made, from which list double registration could be determined.

There were incidents where individuals representing community groups or themselves brought in as many as 10,000 new voter registration cards into the election offices at one time (44a).

> The Court: So individuals who were interested in the outcome of the elections brought in 5,000 or 10,000 applications?
>
> The Witness: That is right.

The testimony of Mrs. Dolan is reproduced in its entirely in the appendix (25a, et. seq.).

In terms of protecting voters' rights, in the language of Mr. Justice Powell in *Anderson v U.S., supra,* does it really matter whether votes are diluted or fraudulently cast by reason of negligence, or by reason of fraud committed by an election official, or by other voters? Is not the assurance of a

free, unfettered and constitutional election the goal mandated by our Federal Constitution?

Judge Mishler cited no legal authority for the proposition that in any civil rights case wherein a voter seeks to enforce his constitutional right to a clean election, he is precluded from demonstrating negligence, etc., by election officials and must prove criminal or quasi-criminal fraud or intent. In effect, Judge Mishler has created a rule of law which requires that in order to upset a fraudulent election, the plaintiff must bring in proof showing the hand of an election official "in the cookie jar." Such a rule of law is applicable where the remedy sought is *in personam*, in a criminal proceeding to punish the wrongdoer; such a rule of law is not applicable where the issue before the Court is in effect *in rem*, i.e., addressed to the tainted election. A citizen concerned with clean elections cannot have his constitutional rights assuaged by an election official spending time in jail; the remedy can only be voiding that which was tainted. A valid analogy and argument made to Judge Mishler was the following: Assuming a citizen learns that milk containing botulism is about to be delivered to school children and seeks injunctive relief to compel school officials or state officials to withdraw the tainted milk from the market, is it necessary to show how the milk became tainted, is it necessary to demonstrate that the officials sought to be enjoined are the ones who put the botulism in the milk? This question is clearly rhetorical and the answer is self-evident. If such be the case, in what respect does a tainted election differ from tainted milk, especially where the election is one involving election to the highest office in this country?

Good faith on the part of election officials cannot and is not a bar to injunctive relief. *Demkowicz v Endry*, 411 F. Supp. 1184, 1191 (USDC, SD Ohio) (1975):

> "Plaintiff insists that the good faith and reasonable belief defense enunciated in *Wood v Strickland* and like cases may not serve to bar any form of equitable relief. There would be, of course, no purpose in permitting such a

defense to bar prospective injunctive relief and there appears to be general agreement that the defense is not available in such a case."

Conclusion

The Judgment of Dismissal Should Be Modified.

Respectfully submitted,

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